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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

No.85-937

STATE OF WEST VIRGINIA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court Appeals
For The Fourth Circuit

MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS BY THE STATE OF CALIFORNIA

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AMICUS BRIEF OUT OF TIME

Now comes the State of California, acting through the California State Department of Education, by their attorneys, John K. Van de Kamp, Attorney General, Charlton Holland, Assistant Attorney General, Elisabeth C. Brandt, Supervising Deputy Attorney General, and Peter G. DeMauro, Deputy Attorney General, and move this Court to direct the clerk to accept and file the amicus

brief submitted herewith, and as grounds therefor says:

1. That the issue raised in this Certiorari proceeding -- whether the United States is entitled to prejudgment interest against a sovereign state in the absence of express contractual or statutory authority -- is of great concern to California and is an issue in at least two cases currently being litigated by California against the United States in federal courts;

2. That after the time had expired for filing an amicus brief in this matter, the Department of Education of the State of California learned that a planned amicus brief to be filed in this proceeding in support of petitioner by another state would not be filed because of that state's inability to get certain information it required for the brief

from the federal government in a timely manner.

3. That the State of California's interest in the outcome of this certiorari proceeding, as well as the interests of several other states, may not be adequately represented by the existing litigants for the following reasons:

A. The court below found that officers of West Virginia promised to pay the United States for services to be rendered by the Corps of Engineers, and thus fully anticipated the liability which was later contested by the State. BY contrast, the claims pending against California (and other states) arise from alleged violations of the penalty and recoupment provisions of ongoing federal grant programs,

which liabilities were unanticipated by the grantee states, and generally arose in spite of the states' good faith efforts to comply with the conditions of the grant programs.

B. The United States' claim against West Virginia arises from a one-time contract rather than an on-going statutory grant program, and thus has considerably less of a statutory foundation than the claims against California and other states. Thus, while common-law or local-law contract principles may have considerable bearing on West Virginia's liability for prejudgment interest, such contract principles may have little impact on the statutory penalty and recoupment provisions underlying the claims against California and other states.

C. While the lower courts found that officers of West Virginia voluntarily assumed responsibility for the cost of the services of the Corps of Engineers prior to their being rendered, the recoupments and penalties sought against California have been contested ever since the claims arose.

4. By reason of the above factors, the statutory bases for, and equities surrounding, the claims for prejudgment interest against California, may be significantly different than those relating to the claims against West Virginia.

5. Consequently, the State of California is concerned that, in the absence of the amicus brief provided herewith, this Court will not be adequately informed regarding the issue of

prejudgment interest on the many claims against the state arising from on-going grant programs. Because of the lack of information before it, the Court may issue a decision which inadvertently sweeps aside the rights of states like California, although, if fully informed, the Court would not wish to do so.

DATED: September 30, 1986

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INTEREST OF AMICUS

Amicus is the State of California, acting through the California Department of Education, and files this brief pursuant to Supreme Court Rule 36. Amicus is vitally interested in the outcome of this case, which raises a critical issue involving intergovernmental litigation in the United States.

The decision below establishes that the federal government may, absent any express grant of authority by Congress, impose prejudgment interest on the several states. The holding of the lower court involves fundamental constitutional principles of Federalism.

The State of California is currently involved in several federal district court cases in which the issue of prejudgment interest is at bar.

The California Department of Education recently prevailed on the prejudgment issue in the United States District Court for the Eastern District of California in the case of Riles v. Bell, No. Civ.-S-82-848 EJG, which case is on appeal to the United States Court of Appeals for the Ninth Circuit. (No. 85-2749.) That appeal has been stayed pending the outcome of the instant case.

The same issue is at bar in a case in which the United States Department of Agriculture sued the California Department of Social Services on a food stamp audit exception and in addition claimed prejudgment interest on the amount alleged due from the date of the demand letter from the federal agency to the state agency. The matter has been briefed, argued, and is presently under submission. (California v. Block, Civ. S-84-1097 MLS; United States District Court for the Eastern District of California. In both California cases, there exists no authority, statutory or otherwise, for the imposition of prejudgment interest by the federal agencies concerned.

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THE UNITED STATES MAY NOT ASSESS PREJUDGMENT INTEREST AGAINST A STATE WITHOUT EXPRESS AUTHORITY FROM CONGRESS

The United States cannot charge prejudgment interest against a state without express authority from the Congress. (Perales v. United States District Court, Southern District of New York, 589 F.Supp. 19 (S.D. N.Y. 1984) aff'd. 751 F.2d 95 (2d Cir. 1984); Commonwealth of Pennsylvania v. United States, 781 F.2d 334 (3d Cir. 1986).

The statutes and regulations governing a federal agency are the exclusive means of collecting on claims against state agencies as well as being the exclusive measure of recovery on those claims.

The United States is not entitled to collect interest from a state agency on claims governed by a

statute which does not authorize it to do so. Board of Commissioners v. United States, 338 U.S. 343, 351 (1939).

If Congress intends an agency of the United States to charge and collect prejudgment interest, it can, and has, provided the authority for a federal agency to do so. For example, Congress has authorized the United States Department of Health and Human Services to charge interest in the Medicaid Program. (P.L. 9-499, § 961 adding subsection (d)(5) to § 1905 of the Social Security Act, codified as 42 U.S.C.A. § 1396(d)(5).)

In contrast, there exists in 20 U.S.C. 3474(a) a comprehensive scheme for final audit determinations and appeals involving the United States Department of Education and the several

states. The scheme does not provide for prejudgment interest. If Congress had intended the states to pay interest on amounts ultimately held to be owing to the United States Department of Education, it could easily have so provided. The failure of Congress to provide for interest liability, when it clearly provided liability for the underlying audit exception, can only be interpreted as an intent that states should not be liable for any interest.

In the California education audit case, Riles v. Bell, interest was imposed on audit exceptions in a federal grant-in-aid program. When the funds were awarded to the state or local educational agency, they were awarded for a particular purpose with no understanding on the part of either party that any amount would have to be returned to the

Federal Government at all, much less on a certain date. A mere claim by an auditor does not give rise to liability on the part of a state, nor does a "Final Audit Determination" which is a claim by a Primary Action Official at the United States Education Department based upon an auditor's claim.

When the federal government enters into any contractual relationship with the several states, the states only assume those obligations which are expressly provided by statute. (Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981); Board of Education v. Bowley, 458 U.S. 176 (1982).)

The "common law" does not offer precedent for the imposition of interest liability on a sovereign state. We are dealing here not with concepts of commerce between two individuals but with

quasi-contractual relationships between sovereign governmental entities. No cases have been cited, and none have been found, which support the notion that a governmental entity is liable for interest on amounts which have not been adjudicated as due and owing.

The review of several other cases involved with the interest issue do not support a common law approach to that issue.

Royal Indemnity Co. v. U.S., 313 U.S. 289 (1941) was a suit to recover on a bond posted by the company to guarantee payment of an individual's tax liability. The underlying statute, the Internal Revenue Code, itself imposed liability on the taxpayer for interest on delinquent taxes (313 U.S. at 295). Further, the bond agreement posted by the company subjected the company to liability for interest as a

matter of contract. The case certainly does not stand for the proposition that the government has a common law right to recover interest.

The early case of Young v. Godbe, 82 U.S. (15 Wall.) 562 (1873) similarly involves a default by the debtor in making a payment. The debtor admitted owing the funds and the only issue in the case was whether he owed the funds in his individual capacity or as a director of a company. It appears that the debt arose because of a default in a contract to pay.

In Swartzbaugh Manufacturing Co. v. U.S., 289 F.2d 81 (6th Cir. 1961), the case involved a private debtor under contract to the federal government.

The above cited cases involve a contractual obligation to pay, one also involves statutory liability for interest, and all three cases involved

individual debtors. None of the cases support the notion that a sovereign state may be held liable for prejudgment interest without either a contract or statutory liability.

The Debt Collection Act is authority for the charging of interest to an individual but is not authority for the assessment of interest against a state. 31 U.S.C. 3717 specifically provides for the charging of interest on debts owed by "a person." Subdivision (c) of section 3701 specifically provides that "a person" does not include a state or a political subdivision.

As originally introduced, the Debt Collection Act of 1982, 96 Stats. 1749, PL 97-365, would have applied to debts owed by states as well as individuals. It applied generally to the assessment of interest on all debts owed the

government. The legislative history clearly described debts owed by state and local governments as within the 72 percent of debts owed by domestic debtors (Senate Report 97-378, to accompany § 1249, U.S.C., Congressional and Administrative Memos, 1982, p. 3378). By its terms, it would have applied except where another statute or an agreement prohibits the charging of interest (31 U.S.C. 952). This broad inclusion of states as debtors was deliberately amended in the October 25, 1982 Senate Amendments to the bill. Section 11 of the bill added the definition of "person" to exclude states a well as political subdivisions and agencies of the United States. These provisions of PL 97-365 were incorporated into PL 97-452 as 31 U.S.C. 3701(a) and 3717 without substantive

change. The legislative intent behind the Senate Amendments is clear: Congress intended to, and did, exempt states and political subdivisions from the payment of interest on debts due to the U. S. Government.

We submit that a state should not, and may not, be held liable on an unpaid and disputed claim until that claim has been reduced to a judgment, either by virtue of the state failing to perfect its appeal or because that claim has been adjudicated in the federal agency's favor.

Likewise, on any matter in which there is not express Congressional authority, the United States cannot by mere fiat impose interest prior to judgment on a disputed claim.

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CONCLUSION

For the foregoing reasons, the amicus asks this Court to uphold the position of the State of West Virginia in this matter. If the Court is inclined to uphold the lower court, amicus asks that this Court distinguish the facts presented herein by amicus in the California cases in its decision.

DATED: September 30, 1986

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SACRAMENTO)

Ina L. Tribble, being first duly sworn on oath deposes and states:

I am over the age of 18 years, and not a party to the within cause; my business address is 1515 K Street, Suite 511, Sacramento, CA 95814. On October 1, 1986, I served the attached MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS BY THE STATE OF CALIFORNIA in said cause, by placing true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United Stated mail at Sacramento, CA, addressed as follows:

Solicitor General Charles Fried
Department of Justice
Washington, D.C. 20530

J. Bradley Russell, AAG
State Capitol, Room 26-E
Charleston, West Virginia 25305

_____
Affiant

Subscribed and sworn to
before me this 1st day of October, 1986.

_____
Notary Public in and for said County
and State